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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1972

No. 72-627

BREZINA CONSTRUCTION CO., INC.,
a corporation, and NIELSEN SCOTT CO., INC.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Government in its Memorandum in Opposition to the Petition for a Writ of Certiorari states:

> "On appeal, petitioners urged for the first time that they were entitled to indemnity for an alleged breach by the government of an implied warranty of workmanlike performance, under *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corporation*, 350 U.S. 124. See Pet. App. 18-19."

The Court of Appeals in its opinion stated:

> "The appellants' implied contract or implied warranty theory would appear to have been designed and generated at this appellate level, for it does not appear from the pleadings or the pre-trial order or the judge's conclusions that this tack was used at trial. From these papers

we gather that appellants were there proceeding on a tort theory." (Pet. App 18-19)

The Court of Appeals and the Government are clearly in error in the observation that petitioners did not urge the implied contract or implied warranty theory of the *Ryan-Weyerhaueser* cases before the trial court. See Brezina's Memorandum in Opposition to the Government's Motion to Dismiss Third-Party Complaint, pp. 99-110 of the trial court record and Memorandum of Nielsen-Scott, Inc., Re: Motion to Dismiss of United States of America, pp. 111-116 of the trial court record.

The Government in its Memorandum stated:

> "The court concluded that the district court correctly applied Utah law and that the petitioners' action could not be maintained as one for contribution between joint tort feasors or as a contract action for indemnity under that law."

If the principles of *Ryan-Weyerhaueser* are applicable to a non-maritime case, as the Fourth Circuit held they are in *General Electric Co. v. Moretz*, 270 F.2d 780 (1959), *Cert.Den.* 361 U.S. 964, this would be a complete answer to that position.

The Petition for Writ of Certiorari should be granted for the reasons stated therein.

Respectfully submitted,

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